



Commonwealth of Kentucky
Finance and Administration Cabinet
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Steven L. Beshear
Governor

Jonathan Miller
Secretary

November 30, 2010

No. 10-31

Charles F. Merz
Charles F. Merz & Associates, PLLC
11414 Main Street, Suite 102
Louisville, KY 40243

RE: Determination of Protest: RFP 729 1100000063 (All FAC – Nursing Services).

Dear Mr. Merz:

The Finance & Administration Cabinet (the “Finance Cabinet”) is in receipt of your letter of protest on behalf of the Guardian Angel Staffing Agency, Inc. (“Guardian Angel”) relating to RFP 729 1100000063 for nursing services (the “RFP”).

FACTUAL BACKGROUND

The Cabinet For Health and Family Services, Department of Behavioral Health, Developmental, and Intellectual Disabilities (“CHFS”) issued the RFP on September 24, 2010. The purpose of the RFP was:

This Request for Proposal (RFP) is being offered for the purpose of issuing personal service contracts to qualified individuals or organizations to furnish nursing services, as described herein, for the residential facilities owned and operated by the Cabinet for Health and Family Services, Department for Behavioral Health, Developmental and Intellectual Disabilities (DBHDID). Residential facilities are to provide for care and treatment on a 24 hour basis for those individuals with behavioral health, developmental and intellectual disabilities who cannot be treated on an outpatient basis. These state residential facilities include: Kentucky Correctional Psychiatric Center (KCPC), Central State Hospital, Central State ICF/MR/DD, Glasgow State Nursing Facility; Hazelwood Center and HOMES (Del Maria, Windsong, and Meadows), Kentucky Correctional Psychiatric Center (KCPC), Western State Hospital and Western State

Nursing Facility.

The Cabinet currently has personal service contracts with five (5) vendors to provide services covering all these facilities.

RFP, Section 1.00—Purpose and Background. Further,

The Department for Behavioral Health, Developmental and Intellectual Disabilities' (DBHDID) facilities listed below are required by federal and state regulatory agencies as well as various clinical and professional organizations to provide an adequate complement of nursing staff. Nursing staff includes: registered nurses, registered nurse supervisor, licensed practical nurses, certified nursing aides, certified medication technicians, patient support associates/patient aides, and residential service workers. **The intent of this RFP is to obtain both temporary/emergency (PRN) and long term (full and part-time) staffing assistance in these skill levels.** Coverage shall be for all shifts, twenty-four hours per day, seven days per week. These services are required in order for the facility to maintain compliance with 42 CFR 483 and 902 KAR Chapter 20.

This RFP may result in multiple personal service contract awards. The facilities have been grouped together and, bidders may bid on all or any group of facilities. Bidders may not bid on individual facilities. As staffing is needed, the Facility may contact any vendor awarded a contract for their Group.

RFP, Section 2.00—Description of Services. In addition,

Notwithstanding any other provision of this Contract to the contrary, for any and all staffing or personnel services provided pursuant to this Contract, the Second Party expressly agrees to, and hereby acknowledges, the following:

. . . .

k)--Any decision whether or not to fill any staffing vacancies, any decision to provide space in any required facility orientation, any decision to contact or request staffing services from the Second Party, and any decision whether or not to use this Contract to fill any staffing vacancies shall rest entirely and exclusively in the discretion of the CHFS. Under no circumstances is the Second Party guaranteed any work under this Contract; the Second Party is merely an authorized provider of the services detailed herein. The CHFS hereby reserves the right to contract with any other vendor, to perform the services described in this Contract.

l) In the event that multiple contracts are awarded for provision of the services detailed herein, the CHFS is authorized, in its sole discretion, to contact or request services from any vendor and shall not be required to

contact vendors in any particular order with regard to performing any services detailed herein.

RFP, Section 2.06—Staffing Services. Further, the RFP provided:

The Cabinet reserves the right to leave any portion of the contract unused or to establish other contracts for additional or related services. The Cabinet makes no guarantee of minimum services required by any contract.

RFP, Section 3.12—No Required Use of Contract.

On October 4, 2010, Guardian Angel filed a protest to the solicitation. Guardian Angel contends: (1) the RFP fails to award the contract based on “best value” to the Commonwealth; (2) the RFP allows CHFS to contact any contract awardee “without reference to cost to tax payers” and (3) the RFP, Section 3.12 is ambiguous. On October 7th, the agency filed a response. For the reasons stated herein, this protest is DENIED.

DETERMINATION

After a review of the (1) solicitation, (2) the protest, (3) the agency response, and (4) the applicable statutes and regulations (collectively, the “Record”), the Secretary finds and determines as follows:

Any actual or prospective bidder who is aggrieved in connection with the solicitation or selection for award of a contract may file a protest with the Secretary of the Finance Cabinet. KRS 45A.285. The protest indicates that Guardian Angel intends to submit a proposal in response to the RFP. Therefore, Guardian Angel is a prospective bidder and has standing to protest the content of the RFP.

A protest must be filed promptly and, in any event, within fourteen (14) calendar days after the aggrieved person knows or should have known of the facts giving rise thereto. KRS 45A.285(2). Here, CHFS issued the RFP on September 24, 2010. The protest was received on October 4, 2010. The protest was filed within two calendar weeks and is, accordingly, timely.

This RFP was for a “Personal Service Contract.” KRS 45A.695. A Personal Service Contract (“PSC”) is a contract by which an individual or entity “is to perform certain services requiring professional skill or professional judgment for a specified period of time at a price agreed upon.” KRS 45A.690 (1)(f). An award of a PSC is to be made to the “best qualified of all offerors based on the evaluation factors set forth in the request for proposals and the negotiation of fair and reasonable compensation.” KRS 45A.695(5).

Applying these general rules to the specific grounds of protest, upon review of the record, the Secretary finds as follows:

1. The RFP fails to award the contract based on “best value” to the Commonwealth.

Guardian Angel points out that RFP, Section 2.6, allows CHFS to award contract work, at its sole discretion, to any of the contract awardees. Guardian Angel asserts that this could allow favoritism and would allow CHFS to award work based on factors other than “best value” to the Commonwealth.

CHFS states that it considers cost as well as other RFP factors. The intent of the RFP is to ensure that adequate nursing services are available for its facilities.

Each contract entered into by the Commonwealth contains a requirement for good faith performance by all parties. KRS 45A.015(2); *RAM Engineering & Const.*, 127 S.W.3d 579, 585 (Ky. 2003). This RFP was for a PSC. An award of a PSC is to be made to the “best qualified of all offerors based on the evaluation factors set forth in the request for proposals and the negotiation of fair and reasonable compensation.” KRS 45A.695(5). “Best value” is a component of an analysis for an award under competitive sealed bidding under KRS 45A.080.

Upon review of the Record, the Secretary finds and determines that the RFP was for a Personal Service Contract. The contract(s) are to be awarded based to the “best qualified of all offerors based on the evaluation factors set forth in the request for proposals and the negotiation of fair and reasonable compensation” and not on the basis of “best value.” Further, the contract awardee(s) will be awarded contract work based upon the terms of the RFP, the resulting contract(s), and the obligation of “good faith.” Guardian Angel has failed to show that the RFP terms, specifically, RFP, Section 2.6, were arbitrary, capricious, or contrary to law. This ground of protest is without merit.

2. The RFP allows CHFS to contact any contract awardee “without reference to cost to tax payers.”

This second ground of protest essentially duplicates the first ground. Guardian Angel points out that RFP, Section 2 which allows CHFS to award contract work, at its sole discretion, to any of the contract awardees. CHFS responds that the RFP evaluation will consider cost as well as other RFP factors.

Each contract entered into by the Commonwealth contains a requirement for good faith performance by all parties. KRS 45A.015(2); *RAM Engineering & Const.*, 127 S.W.3d 579, 585 (Ky. 2003). This RFP was for a PSC. An award of a PSC will be made to the “best qualified of all offerors based on the evaluation factors set forth in the request for proposals and the negotiation of fair and reasonable compensation.” KRS 45A.695(5). “Best value” is a component of an analysis for an award under competitive sealed bidding under KRS 45A.080.

Upon review of the Record, the Secretary finds and determines that the RFP was for a Personal Service Contract. The contract(s) were to be awarded based to the “best qualified of all offerors based on the evaluation factors set forth in the request for proposals and the negotiation of fair and reasonable compensation.” Further, the contract awardee(s) will be awarded contract work based upon the terms of the RFP, the resulting contract(s), and the obligation of “good faith.” Guardian Angel has failed to show

that the RFP terms, specifically, RFP, Section 2, were arbitrary, capricious, or contrary to law. This ground of protest is without merit.

3. The RFP, Section 3.12 is ambiguous.

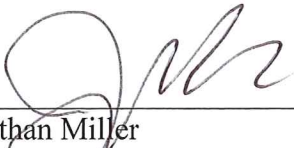
Guardian Angel points to the language of RFP, Section 3.12 which states that CHFS “reserves the right to leave any portion of the Contract unused” and argues that the word “portion” is vague and ambiguous. Guardian Angel suggests that section could be interpreted to mean either: (1) contract terms and conditions could be omitted or (2) some amount of the contract scope of work could be omitted. CHFS counters that this section simply provides that there is no guarantee of work under the ensuing contracts. CHFS points out that RFP, Section 1.06 allows bidders to submit questions if the bidder feels that clarification is needed.

Upon review of the Record, the Secretary finds and determines that Guardian Angel has failed to show that the RFP terms, specifically, RFP, Section 3.12, were ambiguous. CHFS’s interpretation of the provision is the only reasonable interpretation given the express language of the section and the other terms of the RFP. In fact, the Section is labeled “No Required Use of Contract.” Guardian Angel has failed to show that the terms of RFP, Section 3.12 were arbitrary, capricious, or contrary to law. Moreover, the Secretary finds that Guardian Angel had the opportunity to, and failed to, seek clarification of any RFP terms it felt were unclear or ambiguous. This ground of protest is without merit.

Accordingly, upon review of the Record, the protest of Guardian Angel lacks merit. Further, the presumption of correctness in KRS 45A.280 applies and Guardian Angel has failed to provide sufficient evidence to overcome this presumption. Since there is no basis to overturn this procurement, the protest must be **DENIED**. Pursuant to KRS 45A.280:

The decision of any official, board, agent, or other person appointed by the Commonwealth concerning any controversy arising under, or in connection with, the solicitation or award of a contract, shall be entitled to a presumption of correctness and shall not be disturbed unless the decision was procured by fraud or the findings of fact by such official, board, agent or other person do not support the decision.

In accordance with KRS 45A.285 (4), the decision by the Secretary shall be final and conclusive.



Jonathan Miller
Secretary, Finance and Administration Cabinet

cc: Joan Graham, CHFS